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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MINA SHIN, Plaintiff and Respondent, v. TUYETMY N. BUI et al., Defendants and Appellants.	B207772 (Los Angeles County Super. Ct. No. BC366470)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael L. Stern, Judge. Affirmed as modified.

Liebhaber & Masserman, Jack M. Liebhaber, Terri L. Masserman and Mitchell F. Ducey for Defendants and Appellants.

Cole Pedroza, Joshua C. Traver; Law Offices of Brian G. Hannemann and Brian G. Hannemann, for Plaintiff and Respondent.

Respondent Mina Shin was injured in a vehicle accident while riding in a car driven by Tuyetmy N. Bui and owned by Bui's mother, My Hang Thi Hua (collectively "Appellants"). Following a jury trial, a judgment in the amount of $272,273 was entered against Appellants. Appellants appeal from the judgment entered, raising numerous issues. Appellants challenge the trial court's order denying their motion for leave to file an amended answer, the trial court's order denying their motion in limine to bifurcate the trial, the trial court's denial of a stay to allow them to petition for a writ of mandate, and the amount of the damages award. In addition, Appellants allege that they were prejudiced at trial by improper statements by Respondent's counsel and evidentiary rulings by the trial court, and that the trial court abused its discretion in denying their motion for a new trial.

We conclude that the trial court did not abuse its discretion in denying Appellants' motions to file an amended answer, to bifurcate the trial, and for a new trial. Although hearsay evidence was improperly admitted, we conclude that this was not reversible error. However, we agree with Appellants that the amount of damages awarded improperly included costs that Respondent did not incur. We therefore will modify the judgment by reducing the special damages award. In all other respects, the judgment will be affirmed.

BACKGROUND

On March 5, 2005, around 11:00 p.m., Respondent and three other passengers were riding in a car owned by Bui's mother and being driven by Bui. The car was involved in an accident with a bus. After the accident, Respondent was hospitalized for approximately two weeks.

Respondent sued Appellants on February 16, 2007, seeking compensatory damages. On June 1, 2007, Appellants filed an answer, asserting 18 affirmative defenses, including satisfaction and accord and satisfaction.

On August 16, 2007, Appellants' counsel contacted Respondent's counsel and stated that Appellants had relied on a January 16, 2006, statement by Respondent's prior counsel that Respondent would not file a claim against Appellants. On November 1, 2007, Appellants filed a motion to file an amended answer and a motion to file a cross-complaint. Appellants sought to amend their answer to include defenses of estoppel, waiver, and laches, based on Respondent's alleged representation that she would not file suit. Attached to their motion to file the cross-complaint were letters from Appellants' counsel to Respondent's prior counsel, dated October 13, 2005, and December 13, 2005, asking if Respondent was going to file a claim and offering the insurance policy limits to settle the matter. Appellants also attached a January 16, 2006, letter from their insurance company to Respondent's prior counsel, offering "our policy limits globally as settlement of any injury claims arising from this loss."

On November 7, 2007, Appellants filed an ex parte application for an order continuing the trial, or, in the alternative, an order shortening the time to hear Appellants' motions. Counsel for Appellants submitted a declaration, stating that Appellants had notified Respondent of settlement negotiations on September 13, 2005, December 13, 2005, and January 16, 2006, and asked her to participate in the negotiations. The declaration further stated that, in January 2006, Respondent's prior counsel had told Appellants' counsel that Respondent would not file a claim against Appellants.

On November 7, 2007, the trial court denied Appellants' ex parte application and stated that the motions would be heard on December 7, 2007. It appears from the transcript that the trial was scheduled to begin January 7, 2008, although it subsequently was continued to January 28, 2008.

At the December 7, 2007, hearing, the trial court denied both motions. The court explained that "[w]e're on the eve of trial," and that "[t]his information should have been available to the parties long ago." The court further reasoned that the accident had occurred nearly three years earlier, which the court termed "an embarrassment."

Later that month, Appellants filed a motion in limine to bifurcate the trial pursuant to Code of Civil Procedure section 597, seeking to try first their defenses that Respondent had waived her claim through accord and satisfaction and satisfaction of the claim. Appellants also filed a motion to limit Respondent's recovery for medical damages to the reasonable value of the services provided, the amount that Respondent actually paid, or the amount on which she incurred liability to a third party, pursuant to *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 (*Hanif*).

On the same day, Respondent filed a motion in limine to exclude any evidence, argument or testimony that she waived her claim against Appellants. Respondent later filed several motions in limine, two of which are relevant to this appeal. Respondent's Motion in Limine No. 3 sought to exclude all evidence related to treatment she received from psychotherapists, stating that she would not make a claim for emotional trauma beyond what would be expected from such a car accident. Motion in Limine No. 5 sought to exclude all evidence of the personal relationship between Respondent and Appellants.

Trial began on January 28, 2008. Before the jury was brought in, the trial court denied Appellants' motion to bifurcate the trial and granted Respondent's motion to exclude evidence that she waived her claim against Appellants. The trial court then denied Appellants' request to stay the proceedings so that they could file a writ with the court of appeal. The trial court also addressed Appellants' *Hanif* motion, concluding that the medical damages would be limited to the amount paid, as long as that amount could be established by the evidence.

Respondent presented testimony by herself and Bui, and by two doctors who examined her in preparation for trial—Dr. Peter Lee, a specialist in physical medicine and rehabilitation, and Dr. Lorne Label, a neurologist. Appellants called Sarah Bailey, the driver of the bus involved in the accident, to testify. Appellants also called Jai Singh, an engineer who specialized in motor vehicle accident reconstruction, and Dr. Martin David Levine, a physician who specialized in neurology and psychiatry.

Respondent and Bui were high school friends. On the night of the accident, Bui was driving Respondent and three other friends in Bui's mother's car, a Toyota Corolla, from Diamond Bar to an event in the Los Angeles Convention Center. Respondent testified that Bui was not speeding before the accident, but that Bui did not seem to see a red light about half a block before the intersection where the collision occurred. Respondent stated that she was telling Bui to stop because of the red light, but Bui did not stop.

Respondent did not remember the accident, but awoke in the hospital. Respondent's counsel asked Respondent if she asked someone what happened, and when she tried to report what she had learned, Appellants' counsel objected on hearsay grounds. The court overruled the objection, and Respondent stated, "I learned from my mom that I had been in an accident, and that it was because Amy [Bui] ran the red light. That I was in a huge accident; that I needed to stay still. Danny didn't make it." Respondent's counsel asked, "Danny Wong?" Respondent then stated, "Danny Wong didn't make it. He died the night of the accident. She said that I needed to take an MRI. I don't know when." Appellants' counsel moved to strike the entire answer as hearsay, but the trial court overruled the objection.

On cross-examination, Appellants' counsel asked Respondent if it was true that she was talking on her cell phone from the time she entered the vehicle until the time of the accident. Respondent stated that she was talking on her cell phone, but not the entire time up to the time of the accident.

Respondent was hospitalized, first at County-USC Hospital, and then at Good Samaritan Hospital, and discharged on March 20, 2005. Respondent's medical expert, Dr. Label, reviewed Respondent's medical records, examined her on January 16, 2008, and testified at trial that she had suffered a traumatic brain injury during the accident. Dr. Label described Respondent's injury as "axonal shearing," explaining that microscopic tearing and bleeding of nerves occurred inside her brain. Dr. Label thought that

Respondent's strength, balance, walking, and cognitive function were normal, but that she needed specialized testing by a neuropsychologist to determine any further deficits.

Following her discharge from Good Samaritan Hospital, Respondent did not seek medical treatment for several years, until her attorney referred her to Dr. Lee. Dr. Lee first saw Respondent on November 16, 2007. At that meeting, Respondent told Dr. Lee that her walking was "not really normal" and that her memory was weak, complaining that she had trouble "picking up the right word" during conversations. She also complained of weakness in her lower extremities and pain in her neck and lower back.

Bailey, the bus driver, testified that Bui's car was already in the intersection when she first saw it, and that she did not see the car until it was inches from the left side of the bus. Before entering the intersection, she checked a bus stop on her right to see if there were any passengers waiting for the bus, and, after seeing that there were no passengers waiting, she proceeded into the intersection. She did not see Bui's car enter the intersection. She was traveling at approximately 30 miles per hour, and the middle of the bus was in the intersection before the impact occurred. Appellants' counsel asked Bailey if she applied her brake prior to impact, and she replied that she would not have applied the brake because the light was green. Counsel for Appellants moved to strike the answer as non-responsive, but the court overruled the objection. Bailey later stated that the light was red as she approached the intersection, but that it turned green when she was about half a block from the intersection.

Bailey testified that she had no problems with the visibility of the intersection, although she later stated that she could not see the intersection because of a building on the corner. Bailey estimated that it would take approximately "half a football field" to stop the bus, which she stated weighed 300,000 pounds and was traveling at 30 miles per hour.

Bui testified that Respondent was talking on her cell phone at the time the accident occurred. She did not recall Respondent telling her to stop for a red light, whether or not the light was red, and whether or not she applied her brakes before the accident.

Singh testified that he was an engineer and "accredited traffic accident reconstructionist," and that he was certified in vehicle damage appraisal and analysis. In preparation for his testimony, Singh reviewed the traffic collision report, the bus incident report, the depositions of the investigating officer, the bus driver and one of the passengers in Bui's car, a number of photographs of the accident and the two vehicles, and the repair estimates for the bus and Bui's car. Singh also inspected the accident scene, the bus that was involved, and extensive data about the vehicles, such as crash test data and structural composition data.

Singh testified that the bus was traveling southbound and Bui's car was traveling westbound toward the intersection. The front of the bus collided with the right side of Bui's car in the accident. Singh's opinion was that Bui was traveling at 11 to 13 miles per hour, and the bus was traveling at 33 to 35 miles per hour. Singh's opinion was based on data that enabled him to determine the strength of the car, how much energy was absorbed by the car during the crash, the weights of the vehicles, and the post-impact projectory. He then used a mathematical technique known as "conservation of momentum" to calculate the vehicles' speeds. Singh also opined that Bui's car was in the intersection for 1.5 to 1.8 seconds before the bus entered the intersection. Singh made this determination using the speeds of the vehicles and the point of impact. The significance of this determination was that, because of the bus driver's deposition testimony that she had an unobstructed view of the intersection prior to entering the intersection, Singh testified that the bus driver had "substantial time to observe the Toyota as it entered the intersection." Singh was unable to determine "what the color of the light was for either direction of travel." He testified that there was no way to determine the color of the light because the physical evidence and the speeds of the vehicles would have been the same regardless of which vehicle had the red light.

Dr. Levine, a neurologist and psychiatrist, testified that he performed a neurological examination of Respondent in December 2007. Dr. Levine explained that a neurological examination consists of physical, psychiatric, and mental tests. He stated

that Respondent's memory was excellent and that her memory deficit from the accident was antegrade, meaning that she had no memory from the moment of impact until she awoke at the hospital. He found no problems with her memory, her mental status, or her lower extremities. Dr. Levine concluded that Respondent had suffered a concussion, but that her injuries had resolved by the time of the examination.

During jury deliberations, the jury asked the trial court, "If we disagree with the proposed amount for loss, how do we determine an alternate amount?" The court responded, "The jury has been provided with adequate instructions responsive to this question." The jury then returned a special verdict in favor of Respondent, awarding Respondent $65,273 in past medical expenses, $7,000 in future medical expenses, $150,000 in past noneconomic damages, and $50,000 in future economic damages, for a total of $272,273. The court entered judgment against Appellants on February 8, 2008.

Appellants filed a motion for new trial, arguing that the jury award was excessive and unsupported by sufficient evidence, and that the trial court abused its discretion in denying their various motions. Appellants also filed a declaration of a hospital employee, Steve Garcia, and the bill from Good Samaritan Hospital, which indicated a Blue Cross of California adjustment of $4,781.68. In their reply brief, Appellants again raised the *Hanif* issue, arguing that the judgment should be reduced because of the contractual adjustment between Good Samaritan Hospital and Blue Cross of California.

The trial court denied the new trial motion, stating that the issues raised by Appellants were no different from those raised before and during the trial. Appellants asked the court about the *Hanif* reduction, but the court denied it. Appellants appeal from the judgment and challenge all pre-trial and post-trial orders.

DISCUSSION

I. Denial of Motion to Amend Answer

Appellants' first contention is that the trial court abused its discretion in denying their motion for leave to amend their answer in order to assert the affirmative defenses of equitable estoppel, waiver, and laches. "It is well established that 'California courts "have a policy of great liberality in allowing amendments at any stage of the proceeding so as to dispose of cases upon their substantial merits where the authorization does not prejudice the substantial rights of others."'" (*Board of Trustees of Leland Stanford Jr. University v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163.) "'In particular, liberality should be displayed in allowing amendments to answers, for a defendant denied leave to amend is permanently deprived of a defense.' [Citation.]" (*Royal Thrift and Loan Co. v. County Escrow, Inc.* (2004) 123 Cal.App.4th 24, 41.)

Nonetheless, the trial court has broad discretion in deciding whether to allow parties to amend their pleadings; thus, the court's ruling "'will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.]' [Citation.]" (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) Courts have been reluctant to grant leave when, for example, there has been unexplained delay in seeking amendment, when the request is made on the eve of trial, or where there has been a lack of diligence. (*Royal Thrift and Loan Co. v. County Escrow, Inc.*, *supra*, 123 Cal.App.4th at pp. 41-42.) Unwarranted delay in presenting a proposed amendment alone may be sufficient to warrant denial. (*Record v. Reason*, *supra*, 73 Cal.App.4th at p. 486.)

Here, the trial court relied on several of these factors in denying the motion for leave to amend. The court reasoned that it was the eve of trial and that Appellants should have been aware of the information regarding the alleged representation by Respondent's counsel long before they moved to amend. The court further reasoned that, by the time the case went to trial, three years would have passed since the accident occurred.

The length of time between the accident and the trial was not Appellants' fault because it was a function of when Respondent filed suit. Nonetheless, the court's other reasons did not constitute an abuse of discretion.

Appellants' declarations indicate that the alleged conversation in which Respondent promised not to file a claim occurred in January 2006, which was well before Appellants filed their answer in June 2007 and their motion to amend their answer in November 2007. The information regarding the alleged promise accordingly was available to Appellants more than a year before they filed their answer and nearly two years before they filed their motion to amend. Appellants offered no explanation for the lengthy delay, and the amended answer may have required further discovery between the parties. Under these circumstances, the trial court's ruling did not constitute a manifest or gross abuse of discretion and so must be upheld. (*Record v. Reason*, *supra*, 73 Cal.App.4th at p. 486.)

II. Motion to Bifurcate Trial

Appellants argue that the trial court erred in denying their motion to bifurcate the trial in order to try separately their defenses of accord and satisfaction and satisfaction of claim. Code of Civil Procedure section 597 gives the trial court discretion to hold a separate trial "when the defendant alleges as an affirmative defense that the action is time-barred or alleges another affirmative defense that is potentially dispositive and that is one 'not involving the merits of the [plaintiff's cause of] action. . . .'" (*Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 721.)

"An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled." (Civ. Code, § 1521.) Satisfaction is defined as "[a]cceptance, by the creditor, of the consideration of an accord extinguishes the obligation." (Civ. Code, § 1523.) "The elements of an accord and satisfaction are: (1) a bona fide dispute between the parties, (2) the debtor sends a certain sum on the express condition that acceptance of it will

constitute full payment, and (3) the creditor so understands the transaction and accepts the sum." (*In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1058.)

Although Appellants' motion was based on the defenses of satisfaction of claim and accord and satisfaction, when they argued the motion in court, their only argument was that Respondent had represented that she would not be filing a claim against them. Their request to have their defenses heard separately from the trial on the merits of Respondent's claim accordingly was based on the defenses that the trial court already had rejected when it denied their motions to amend and to file a cross-complaint. As Respondent argued, Appellants' motion was in fact merely "a motion for reconsideration of the previous motions which were denied."

In addition, Appellants' memorandum in support of their motion to bifurcate the trial did not raise any new arguments or point to any new evidence to support their defenses of satisfaction of claim and accord and satisfaction. Appellants provided no evidence that the parties had reached an agreement regarding the acceptance of a certain sum or an understanding by Respondent that she would accept such a sum.

Thus, although the trial court gave no reason for denying the motion to bifurcate, it is apparent from the record that the denial did not constitute an abuse of discretion.

Appellants contend that the trial court erred in denying their request to stay the trial in order to allow them to file a writ to challenge the court's decisions denying their motions. Appellants cite *Henry v. Superior Court* (2008), 160 Cal.App.4th 440, in which the appellate court stayed the trial court proceedings and issued an order to show cause why the requested relief should not be granted. In that case, however, unlike the instant case, the party actually petitioned for a writ of mandate. Appellants have offered no explanation for their failure to seek a writ of mandate.

III. Damages Award

Appellants challenge the damages award on several grounds. Our power "'to review the trier of fact's determination of damages is severely circumscribed. An appellate court may interfere with that determination only where the sum awarded is so

disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption [citations] or where the award is so out of proportion to the evidence that it shocks the conscience of the appellate court. [Citations.]'" (*Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361.)

A. Future Non-Economic Damages

Appellants' first contention is that the evidence is not sufficient to sustain the $50,000 award for future non-economic damages because Respondent's own expert, Dr. Label, testified that Respondent had fully recovered from her injuries. Appellants also cite the testimony of defense witness, Dr. Levine, who testified that Respondent's memory was "excellent," and that her physical examination revealed no abnormalities.

Dr. Label testified that Respondent had suffered a traumatic brain injury and that her MRI revealed tearing of nerves inside the brain, causing swelling. He stated that such damage can cause problems with memory, judgment, or concentration. He further testified that Respondent had recovered "pretty close but probably not 100 percent," and that further testing would be required, at an estimated cost of $4,000 to $7,000. Under cross-examination, Dr. Label stated that, after conducting Respondent's neurological examination, he had concluded that Respondent's neurocognitive assessment was normal and that she had no abnormalities and no need for further neurological treatment.

Respondent testified that she experienced forgetfulness and clumsiness. Dr. Lee testified that Respondent complained to him of weakness in her memory, cognition, and ambulation, and that she had pain in her neck and lower back. He noted a deficit in her gait and recommended that she avoid heavy lifting and long car rides.

Dr. Levine testified that he conducted a neurological examination of Respondent in December 2007 and that her memory was excellent. He stated that she experienced "antegrade amnesia" at the time of the accident because she had no memory "from the moment of impact until she awakened at the hospital," but that "she began processing thereafter." He concluded that Respondent had had a concussion with a traumatic brain injury, but that they had "resolved."

Viewing the evidence in the light most favorable to Respondent, we conclude that the damages award is supported by substantial evidence. (See *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 65 [reviewing the evidence in the light most favorable to the respondent to determine whether substantial evidence supported the jury's damages award].) Although the testimony regarding Respondent's condition was not overwhelming, the amount of the award is not "'so disproportionate to the evidence'" as to "'shock[] the conscience.'" (*Johnson v. Stanhiser, supra,* 72 Cal.App.4th at p. 361.) The fact that Dr. Levine's testimony was inconsistent with the testimony of Respondent's witnesses is not reason to reverse because, "[u]nlike the jury and the trial judge, we did not see or hear the witnesses and cannot resolve evidentiary conflicts regarding the severity of injuries or their cause." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 321.)

B. Past Non-Economic Damages

Appellants also argue that Respondent presented no evidence to support the $150,000 award for past non-economic damages. Appellants point out that Respondent did not testify about any pain or suffering following her discharge from the hospital on March 20, 2005, and that she did not seek any medical treatment until November 16, 2007. Appellants further contend that Respondent waived her emotional distress claim, citing her motion in limine to exclude evidence obtained from her psychotherapist and any evidence of her psychological treatment. "'[W]hen a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'" (*Da Silva v. Pacific King, Inc.* (1987) 195 Cal.App.3d 1, 10-11.)

Appellants rely on *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121 (*Mokler*), in which the court of appeal affirmed the trial court's decision to overturn the

jury's damages verdict and grant a new trial on damages. Unlike *Mokler*, a hostile work environment case which involved "no physical pain and suffering," (*id.* at p. 147) Respondent was in a vehicle accident and hospitalized for two weeks as a result. We therefore disagree with Appellants' contention that there was no evidence regarding past pain and suffering.

The procedural posture in *Mokler* also is distinguishable because the trial court there had decided to overturn the damages award. Here, Appellants challenged the amount of damages awarded in their new trial motion, but the trial court rejected their argument. "We do not question the discretionary determinations of jury and judge, so long as they fall within a reasonable range permitted by the evidence." (*Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 857.)

As for Appellants' contention that Respondent waived her claim by moving to exclude all evidence of her psychological treatment, Respondent did present testimony regarding the pain and suffering she underwent as a result of the accident and her injuries. (Cf. *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1079-1080 [affirming a $150,000 award of noneconomic damages where the only evidence of the plaintiff's syndrome was "the plaintiff's subjective description of pain"].)

C. Past Medical Expenses

Appellants rely on *Hanif* to contend that the award for Respondent's past medical charges should be reduced by the amount by which Good Samaritan Hospital reduced its bill pursuant to its contract with Blue Cross California Care. We agree.[1]

Hanif held that "an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation." (*Hanif, supra*, 200 Cal.App.3d at p. 641.) "As medical expenses fall into the category of economic

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[1] We disagree with Respondent's contention that Appellants have waived this issue. Appellants raised the issue in the trial court several times, and the trial court agreed that, pursuant to *Hanif* and *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 306 (*Nishihama*), the amount of medical damages would be limited to the amount paid.

damages, they represent actual pecuniary loss caused by the defendant's wrong." (*Nishihama, supra*, 93 Cal.App.4th at p. 306.) "Thus, when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact it may have been less than the prevailing market rate." (*Hanif, supra*, at p. 641.)

In *Hanif*, the trial court found the reasonable value of medical services received by the plaintiff to be $12,301 greater than the amount that Medi-Cal paid, and there was no evidence that the plaintiff was or would become liable for the difference. The hospital had written off the balance between the amount billed to Medi-Cal and the amount paid, but the trial court awarded the plaintiff the reasonable value of the services. On appeal, the court reasoned that "a plaintiff is entitled to recover *up to, and no more than*, the actual amount expended or incurred for past medical services so long as that amount is reasonable." (*Hanif, supra*, 200 Cal.App.3d at p. 643.) The court thus concluded that the trial court "erred in awarding plaintiff, as special damages for past medical care and services, the reasonable value of that amount exceeding the actual amount paid." (*Id.* at pp. 643-644.) Because there was no dispute that the amount paid by Medi-Cal was reasonable, the court modified the judgment rather than remanding for a retrial on the issue. (*Id.* at p. 644.)

Similarly, in *Nishihama*, a jury awarded the plaintiff $20,295 to cover her medical costs after she was injured by falling in a pothole. The amount of the award included $17,168 for care that the plaintiff received from a hospital, which had agreed by contract with the plaintiff's insurer to accept only $3,600 for the services rendered to the plaintiff. On appeal, the court found that the jury had improperly awarded the plaintiff costs that she did not incur. (*Nishihama, supra*, 93 Cal.App.4th at p. 301.) The court therefore reduced the amount of the award to cover only the costs the plaintiff actually incurred. (*Id.* at p. 309.) As in *Hanif*, the court simply modified the judgment to reduce the amount awarded. (*Id.* at p. 309.)

Before trial, Appellants filed a motion in limine to limit Respondent's medical damages to the reasonable value of the services provided, the amounts that Respondent actually paid, or the amount for which Respondent was liable to a third party. Appellants relied on *Hanif* in their motion and their memorandum in support, and, at the hearing on the motion, the trial court recognized that the motion was a "*Hanif Nishihama* type motion." The court asked what amount had been paid, and Appellants' counsel explained that there was a bill in the exhibits showing the amount that had been paid. The court responded that "We're going to limit the medical specials to what's been paid if there is an agreement that you can point to that that was it." Respondent's counsel asked whether that limitation would "be done in front of the jury or post trial," and the court replied, "I need to see the billings," asked Appellants' counsel to get it, and moved to the next issue.

Shortly after Appellants filed their new trial motion, they filed the declaration of Mr. Garcia, the hospital employee, and the bill from Good Samaritan Hospital. The hospital bill showed that the hospital had applied a Blue Cross adjustment, reducing the bill by $4,781.68. At the hearing on the new trial motion, Appellants asked the trial court about the *Hanif* reduction. The court asked Respondent's counsel for a response, and he stated that it "appears fine to me," but he objected that the declaration did not indicate what Mr. Garcia's position was such that he knew the figure. The court denied the motion, stating only, "Same result."

The record clearly shows that the hospital bill was reduced pursuant to an agreement with the insurer. Contrary to Respondent's argument, the amount of the reduction is not based solely on Mr. Garcia's declaration; the bill itself is in the record. Respondent has not disputed the fact or the amount of the reduction, and her counsel in fact stated during the hearing that the amount appeared to be proper. Pursuant to *Hanif* and *Nishihama*, we therefore modify the judgment by reducing the amount awarded as past medical expenses from Good Samaritan Hospital by $4,781.68.

D. Future Medical Expenses

Appellants challenge the $7,000 award for future medical expenses, reiterating their arguments regarding the findings of Dr. Levine. Again, in addressing a challenge to a damages award, "we do not reassess the credibility of witnesses or reweigh the evidence." (*Westphal v. Wal-Mart Stores, Inc., supra*, 68 Cal.App.4th at p. 1078.) "The evidence is insufficient to support a damage award only when no reasonable interpretation of the record supports the figure. [Citation.]" (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 691.) Appellants have not presented evidence to establish that the award was so excessive as to shock the conscience; therefore, we must uphold the award. (*Westphal v. Wal-Mart Stores, Inc., supra*, at p. 1078.)

Appellants' challenge to the damages award accordingly is rejected, except to the extent that the judgment is modified pursuant to *Hanif* and *Nishihama*.

IV. Right to a Fair Trial

Appellants contend that they were deprived of their right to a fair trial, alleging that Respondent's counsel made improper arguments in his opening and closing statements and that the trial court made erroneous rulings and made objections on Respondent's behalf during Respondent's testimony. "No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed." (Code Civ. Proc., § 475.)

A. Opening Statement

During his opening statement, Respondent's counsel stated that Respondent was suing for two reasons. Appellants' counsel objected that this statement was argumentative, and the court replied, "Go ahead, please." Shortly thereafter, Respondent's counsel stated that Bui ran a red light, even though she "knows and was

taught that all drivers stop for red traffic signals. All drivers know if you don't stop for a red traffic signal and you run it, someone could be coming from the other way and could run into you. Everybody knows that if you do that, the forces could be dramatic; people could be killed." Appellants' counsel objected that this was argumentative, and the court admonished Respondent's counsel to "stick to the facts."

Respondent's counsel continued, stating that "The final reason for suing is that the defendants refuse to meet their obligation, so we have to meet here in trial." Counsel for Appellants again objected that this was argumentative, and the court agreed. Appellants' counsel moved to strike, and then the transcript states that there was "no audible response" from the court. There were no further objections to the opening statement.

"In addition to objecting, a litigant faced with opposing counsel's misconduct must also 'move for a mistrial or seek a curative admonition' [citation] unless the misconduct is so persistent that an admonition would be inadequate to cure the resulting prejudice [citation]." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794-795.) Appellants' counsel did not move for a mistrial or seek a curative admonition. These three instances of argumentative statements are not sufficient to find that the misconduct was so persistent as to preclude the need for opposing counsel to seek a curative admonition. A party who fails timely to assert a right forfeits that claim. (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1158, fn. 4.) Appellants accordingly have forfeited the issue.

B. Respondent's Testimony

Appellants contend that the trial court erred in overruling their hearsay objection to Respondent's testimony. "We review a trial court's evidentiary rulings for an abuse of discretion." (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1026.) "Trial judges enjoy '"broad authority"' over the admission and exclusion of evidence." (*Greer v. Buzgheia, supra,* 141 Cal.App.4th at p. 1156.)

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter

stated." (Evid. Code, § 1200, subd. (a).) "Generally, hearsay evidence is inadmissible unless the law provides an exception for its admission. [Citation.] Double hearsay is admissible if each level falls within an exception to the hearsay rule. [Citation.]" (*DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 680.) "The purpose of the 'hearsay rule' is to preserve a party's Sixth Amendment right to confront and cross-examine an adverse witness and to disallow testimony coming from a witness who is not under oath and whose demeanor cannot be observed by the trier of fact." (*In re Michael G.* (1993) 19 Cal.App.4th 1674, 1677.)

Appellants contend that the trial court erred in overruling their objections to Respondent's testimony when she testified about what her mother told her when she awoke in the hospital. When Respondent's counsel asked Respondent what she was told, Appellants' counsel objected on hearsay grounds. The court overruled the objection, and Respondent stated, "I learned from my mom that I had been in an accident, and that it was because Amy ran the red light. That I was in a huge accident; that I needed to stay still. Danny didn't make it." After Respondent's counsel asked, "Danny Wong?" Respondent stated, "Danny Wong didn't make it. He died the night of the accident. She said that I needed to take an MRI. I don't know when." Appellants' counsel moved to strike the entire answer as hearsay, but the trial court overruled the objection.

Respondent contends that her statements were not hearsay at all because they were offered, not to prove the truth of the matter asserted, but as circumstantial evidence of her condition of unconsciousness. One exception to the hearsay rule is "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation . . . when . . . [t]he evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time . . . ." (Evid. Code, § 1250, subd. (a)(1).)

This argument is specious. Respondent already had testified that she did not remember the accident and awoke in the hospital, so her unconsciousness was established by other evidence. The fact that another passenger died in the accident is not relevant to prove that Respondent was unconscious. In addition, even if the fact of the other

passenger's death was relevant and the statement was not hearsay, it is prejudicial because "it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.)

Even more troubling is the statement that Respondent's mother told her that the accident was caused by Bui running a red light. Her mother's statement that the accident was caused by Bui is not relevant to Respondent's state of mind. In addition, there is no indication of the source of Respondent's mother's statement that Bui ran a red light. She was not a witness to the accident, so she presumably heard it from another source, making the statement at least double hearsay, which is admissible only if "each level falls within an exception to the hearsay rule." (*DiCola v. White Bros. Performance Products, Inc.*, *supra*, 158 Cal.App.4th at p. 680.)

The cause of the accident obviously was a key issue that Respondent needed to prove at trial. Respondent's mother's statement that Bui caused the accident directly supports her assertion and so "is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).)

Respondent's mother did not testify; therefore, her statement was not made under oath, and Appellants had no opportunity to cross-examine her. Nor did the jury have an opportunity to assess her credibility. The testimony accordingly should have been excluded as hearsay evidence. (See *People v. Williams* (1990) 222 Cal.App.3d 911, 916 [stating that the main reasons for excluding hearsay evidence are that the statements are not made under oath; the adverse party cannot cross-examine the person who made them; and the jury cannot observe the person's demeanor while making them].)

Our conclusion that the testimony was erroneously admitted does not end our inquiry. Instead, we must determine whether the error was prejudicial and therefore constitutes reversible error. (See *Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at pp. 800-802 [discussing *People v. Watson* (1956) 46 Cal.2d 818, which sets forth the

standard for determining whether trial errors require reversal]; see also *People v. Reed* (1996) 13 Cal.4th 217, 230-231 [concluding that evidence was inadmissible hearsay, but that its introduction caused no prejudice].) Trial error is reversible only if "'the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*Cassim v. Allstate Ins. Co., supra*, 33 Cal.4th at p. 800.) "'We have made clear that a "probability" in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.' [Citation.]" (*Ibid.*)

In order to determine the prejudicial effect of this testimony, we examine the admissible evidence in the record regarding the cause of the accident to determine whether there is a reasonable chance that the erroneous admission of the testimony affected the verdict. Besides this inadmissible statement of Bui's mother, Respondent did not present any other evidence regarding the cause of the accident. Bui testified that she did not remember colliding with the bus or the color of the traffic light before the accident. Appellants called the bus driver, who testified that Bui's car was already in the intersection, and that she did not see the car enter the intersection. She checked the bus stop on her right before entering the intersection and entered the intersection after seeing that there were no passengers waiting at the bus stop. She stated that the light was red as she approached the intersection, but that it turned green approximately half a block before she reached the intersection. She stated that she did not slow down or apply her brake because she had a green light. She estimated that the bus would need "half a football field" to stop, which Respondent's counsel inexplicably interpreted as 150 yards.

Singh, the accident reconstruction expert called by Appellants, testified that it was not possible for him to determine the color of the light, but he estimated that the bus was traveling at 33 to 35 miles per hour and that Bui was traveling at 11 to 13 miles per hour. He also testified, consistent with Bailey's testimony, that Bui's car was in the intersection before the bus. Singh's opinion was that the bus had "substantial time to observe the

Toyota as it entered the intersection." Respondent testified that the light was red and that Bui did not seem to notice the red light as she approached the intersection.

In summary, the first evidence that the jury heard regarding the cause of the accident was Respondent's testimony that her mother told her, when she awoke in the hospital, that Bui had run the red light. Bui testified that she could not remember anything about the accident. The bus driver testified that Bui's car was in the intersection before the bus, but she did not see it before impact, that the bus had a red light as it approached the intersection, and that the light turned green about half a block before it entered the intersection. Singh's accident reconstruction expert testified that Bui's car was in the intersection in time for the bus to see the car before entering the intersection.

After examining "'the entire cause, including the evidence,'" we conclude that it is not reasonably probable that a result more favorable to Appellants would have resulted in the absence of the error. (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 800.) In addition to the improperly admitted evidence that Respondent's mother told her that Bui ran the red light, the jury heard detailed testimony about the accident and the color of the light just before the accident from the bus driver and the accident reconstruction expert and then rendered a verdict in favor of Respondent. It does not seem reasonably probable that the jury would have relied on this one hearsay statement rather than the two detailed accounts of the accident in reaching its verdict.

C. Closing Statement

Appellants contend that Respondent's counsel erroneously referred to the friendship between Respondent and Bui, despite Respondent's own motion to exclude evidence of the friendship. Respondent's Motion in Limine No. 5 sought to exclude evidence of the personal relationship between Respondent and Appellants because it was irrelevant and prejudicial. She contended that Appellants would "try to put [Respondent] in a negative light by arguing that she filed a lawsuit against friends," thus portraying her "as a betrayer of friends or as a bad person." The motion was granted.

Nonetheless, in his closing statement, Respondent's counsel stated that Bui's "refus[al] to accept responsibility for the harms that she alone caused" added "salt to the wound" that Respondent had suffered. Respondent's counsel also emphasized that Bui did not apologize to Respondent and further stated that Bui "could have made up for what she could have made up for, helped out her friend in a time of need, maybe paid some of the bills."

Although Respondent's counsel's statements regarding the friendship violated the very motion in limine that she sought and received, Appellants' counsel failed to object to the statements. "'Generally, to preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial.' [Citation.]" (*Cassim v. Allstate Ins. Co., supra,* 33 Cal.4th at p. 794.) Appellants accordingly have forfeited the issue. "[T]he appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) We decline to exercise our discretion and therefore do not address this issue.

V. New Trial Motion

Appellants' final contention is that the trial court erred in denying their motion for a new trial. """[A] trial judge is accorded a wide discretion in ruling on a motion for new trial and [] the exercise of this discretion is given great deference on appeal. [Citations.]""" (*Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 693-694.) Nonetheless, in reviewing an order denying a new trial motion, """we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial.""" (*Id.* at p. 694.)

Appellants' new trial motion raised the issues that have been raised on this appeal. Appellants challenged the amount of damages as excessive, the sufficiency of the evidence to justify the jury award, and the trial court's rulings on the various motions.

We have reviewed the entire record, including the evidence. Although, as discussed above, several errors occurred during the trial, "[p]rejudice is required." (*Nazari v. Ayrapetyan*, *supra*, 171 Cal.App.4th at p. 694.) In addition, Appellants forfeited some of its issues by failing to object in the trial court. "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 59.) A manifest and unmistakable abuse of discretion in denying the new trial motion is not apparent in this record. For all of the foregoing reasons, we affirm the trial court's order denying Appellants' new trial motion.

DISPOSITION

The judgment is modified by reducing the damages award for past medical expenses for Good Samaritan Hospital by $4,781.68. As modified, the judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.